Supreme Court, U.S.
FILED
MAR 20 1998
CLERK

No. 97-1350

In The Supreme Court of the United States

OCTOBER TERM 1997

LINDA S. WALDEN; JAMES P. MURPHY; GEORGE C. POIRIER,

Petitioners,

v.

GEORGIA-PACIFIC CORP.; VIRGIL H. GARDNER; MICHAEL A. VIDAN; HOWARD SCHUTTE; DAVID M. WATSON; CURT RIGGIN; ROBERT LINDSEY; JAMES R. HURD; FELMER CUMMINS; GEORGE FOSTER; RICH MOODY; JOHN DOE; JANE DOE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

MICHAEL D. KAUFMAN
Counsel of Record
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the decision of the United States Court of Appeals for the Third Circuit upholding the District Court's refusal of a "mixed motives" jury charge under Title VII of the Civil Rights Act of 1964, as amended, where Plaintiffs failed to present legally sufficient evidence directly reflecting a retaliatory animus on the part of any individual involved in the decision to terminate their employment?

2. Whether this Court should review the decision of the United States Court of Appeals for the Third Circuit upholding the District Court's refusal to admit evidence of a prior conviction of a corporation to impeach the credibility of individual employee witnesses who had no involvement whatsoever in the conduct underlying the corporate conviction?

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1(b) and 29.6 of the Rules of this Court, Respondent lists below all parties to the proceeding and parent and non-wholly owned subsidiary companies of corporate parties:

Appellants and Respondent:

The Petition accurately lists the parties to the proceeding.

Parent and Non-Wholly Owned Subsidiaries of Respondent.

Respondent Georgia-Pacific Corporation has an interest in the following non-wholly owned subsidiaries: Georgia-Pacific Flakeboard Company; Envases Industrial de Costa Rica, S.A.; Fipasa-Fibras, Panama, S.A.; Industria Panamena de Papel, S.A.; Thacker Land Company.

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ADDITIONAL STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule Of Evidence 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Course of Proceedings.

The Complaint in this case was filed in the United States District Court for the District of Delaware on December 28, 1992, by three Plaintiffs who were former employees of Georgia-Pacific Corporation. The original Complaint included eleven claims against Georgia-Pacific and ten of its individual officers and managers. On February 7, 1994 and March 14, 1994, Plaintiffs filed motions to amend their original Complaint, dismissing eight of their claims and all but one of the individual defendants. The District Court granted these two motions, leaving Plaintiffs only three claims in this case: (1) that they were discharged in retaliation for their participation in activity protected by Title VII; (2) that Georgia-Pacific's failure to rehire two of them was likewise retaliatory in violation of Title VII; and (3) that individual defendant Virgil Gardner had defamed them in an internal company memorandum.

Georgia-Pacific and the remaining individual defendant, Virgil Gardner, filed a motion for summary

judgment on October 18, 1994, seeking dismissal of all three claims. The District Court granted Defendants partial summary judgment on June 15, 1995, dismissing the failure to rehire claim against Georgia-Pacific and the defamation claim against Gardner. When the case proceeded to trial on December 11, 1995, the only remaining defendant was Georgia-Pacific and the only issue to be decided by the jury was whether Plaintiffs were discharged in retaliation for their participation in activities protected by Title VII.

The Honorable Joseph J. Farnan, Jr. presided over a jury trial that began on December 11, 1995 and lasted for eight days. On December 20, 1995, after deliberating for less than two hours, the jury returned a unanimous verdict in favor of Georgia-Pacific on Plaintiffs' claim. Plaintiffs filed a motion for new trial on January 15, 1996, which the District Court denied on September 30, 1996.

Plaintiffs filed an appeal of the jury verdict and the District Court's denial of a new trial to the Third Circuit Court of Appeals. The Third Circuit affirmed the jury verdict and the order of the District Court on September 23, 1997. Plaintiffs then moved the Third Circuit for a rehearing and a suggestion for rehearing en banc. The Third Circuit denied both motions on November 19, 1997. Plaintiffs' Petition to this Court followed.

B. Statement of Facts.

Plaintiffs were employed as security guards at Georgia-Pacific's gypsum wallboard plant in Wilmington, Delaware. The Wilmington Plant was one of ten gypsum wallboard plants in Georgia-Pacific's Gypsum and Roofing Division. In December 1990, Carolyn Wunsch, the Wilmington Plant's Personnel and Safety Manager, hired an outside security agency on a temporary basis to permit

Plaintiffs to take vacation during the Christmas holidays. The cost savings the Company realized by using the outside security service in December 1990 caused Wunsch to consider contracting out the entire security function on a permanent basis. Ms. Wunsch discussed her proposal to replace Georgia-Pacific's security guards with George Woodham, Production Superintendent, in January 1991. In February 1991, Wunsch and Woodham presented the proposal to Monty Palmowski, the Wilmington Plant Manager, and Dave Watson, the gypsum division's Production Manager. In addition, Wunsch and Woodham prepared separate memorandums to Palmowski in which they presented the estimated cost savings that could be realized as a result of replacing even a single inside guard with an outside security service.

Although Palmowski rejected the proposal to replace the entire security staff, he agreed to replace one of the Georgia-Pacific security guards with an outside agency on the weekends. In April 1991, Wunsch contacted an outside security agency, OSS Security, to inquire about the cost of providing security services on the weekends at the Wilmington Plant. Shortly thereafter, OSS Security was retained to provide those services at a flat fee of $7.50 per hour. The engagement of OSS Security to provide weekend security services resulted in the elimination of one of the guard positions.[1] Because Phyllis Estepp was the least senior guard at that time, her position was eliminated and she was terminated effective May 17, 1991.

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[1] Plaintiffs' first protected activity involved their being interviewed as a result of another former employee's EEOC charge and occurred on May 7, 1991 -- months after the concept of replacing them with an outside contractor was first presented.

Following the replacement of Estepp with OSS Security, the Wilmington Plant continued to consider the replacement of the entire Georgia-Pacific guard unit with an outside contractor to further save costs. On January 21, 1992, Charles Terry, the interim Plant Manager who replaced Palmowski in December 1991, prepared a memorandum to Howard Schutte, the Gypsum Operations Manager, outlining a cost savings of $46,675.20 per year for replacing the remainder of the Wilmington guard unit with an outside agency. Based on the information contained in Terry's memorandum, Schutte made the decision to eliminate the security guards' jobs at Wilmington in order to cut costs.

Following Schutte's decision, the Wilmington Plant solicited bids from four security agencies. OSS Security was the lowest of the four bidders, and, on that basis, was awarded the contract. As a result of the decision to contract out the entire security function, Plaintiffs' jobs were eliminated and they were terminated on February 21, 1992. Although each of the Plaintiffs was offered the opportunity to apply for a position with OSS Security, none chose to do so. At the time their jobs were eliminated, Plaintiffs were each making $10.68 per hour and the cost of their fringe benefits was $4.11 per hour for a total cost of $14.79 per hour. In contrast, the cost to the Company for the services of OSS Security was $7.50 per hour.

The elimination of Plaintiffs' jobs was consistent with other similar cost cutting initiatives at the Wilmington Plant and throughout Georgia-Pacific's gypsum division between 1990 and 1992. During this time period, there was a significant downturn in the entire gypsum industry as consumer demand, and then gypsum wallboard prices, dropped. Two of Georgia-Pacific's biggest competitors filed for bankruptcy protection, and Georgia-Pacific saw its own

gypsum business turn from a profitable business to an unprofitable business in 1990.

As a consequence of the poor economic conditions, between 1990 and 1992 Georgia-Pacific directed all plants in its gypsum division to cut costs. The Wilmington Plant and other plants in the division took drastic steps to carry out the cost cutting initiatives. Plants examined their energy costs and raw material costs as a means to cut production costs. Plants also eliminated jobs and terminated employees. For example, in late 1990 Georgia-Pacific shut down a wallboard operation in Acme, Texas and terminated over thirty employees. In February and April 1991, the Company shut down similar operations in Blue Rapids, Kansas and Sigurd, Utah. Over forty employees lost their jobs as a result of each of those shutdowns. Plants in the gypsum division also looked for opportunities to contract out services that were not directly involved in the production process, such as security guards, janitors and maintenance employees. As in Wilmington, all but one of Georgia-Pacific's security guards at the gypsum plant in Brunswick, Georgia were replaced by an outside security service in February 1991. On May 4, 1991, the Company replaced all of its security guards at the Buchanan, New York gypsum plant with an outside service.

Consistent with the job eliminations at other plants within the gypsum division, the Wilmington Plant eliminated seven positions other than Plaintiffs' positions between January 1991 and February 1992. Six jobs were eliminated in the plant and the affected employees were laid off pursuant to the applicable union contract. An administrative position, along with Plaintiffs' jobs, was also eliminated in February 1992.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because Plaintiffs have not established any errors of law by the courts below, much less any error requiring correction by the United States Supreme Court, and neither of the two issues raised by Plaintiffs reveals any conflict among the United States Courts of Appeals.

Plaintiffs first contend that the Third Circuit erred when it upheld the District Court's decision not to give a "mixed-motives" jury charge. Under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plaintiff must present "direct evidence" of the employer's retaliatory animus--i.e., evidence that directly reflects a discriminatory or retaliatory animus on the part of a person involved in the decision making process--in order to receive a mixed-motives jury charge. The courts below followed this well-established legal standard and simply determined that Plaintiffs had failed to introduce sufficient direct evidence of retaliation to warrant a mixed-motives charge. While Plaintiffs disagree with the courts' characterization of their evidence as, at most, circumstantial evidence of retaliation, Plaintiffs have not shown that the courts applied the wrong standard in evaluating their evidence nor have Plaintiffs shown how their evidence directly reflects a retaliatory motive on the part of any person involved in the decision to terminate their employment. Rather, Plaintiffs have chosen to distort the underlying factual record and to misrepresent the state of the law in order to manufacture some error below.

Plaintiffs' second argument is that the District Court erred by excluding certain evidence relating to a 1991 corporate tax conviction involving Georgia-Pacific as unduly prejudicial under Fed.R.Evid. 403. Specifically, Plaintiffs contend that a corporation's conviction for any crime

involving dishonesty is automatically admissible under Fed.R.Evid. 609(a)(2) to impeach the testimony of an individual employee witness, regardless of whether the witness had any involvement in events leading to the corporation's conviction. Plaintiffs' argument is plainly incorrect because it overlooks the threshold question of whether Rule 609 should even apply in such a situation. Evidence is admitted under Rule 609 for the sole purpose of informing the jury about the character of the particular witness whose testimony the jury is asked to evaluate. Because it is obvious that only the testifying witness' *own* convictions bear directly on the witness' propensity for truthfulness, the Third Circuit correctly determined that a corporation's conviction is not admissible under Rule 609 unless the conviction is "the individual employee's 'own' in some meaningful fashion"--i.e., the individual employee had some involvement in the events leading to that corporate conviction. Therefore, the District Court properly excluded the evidence relating to the 1991 tax conviction because none of the employees involved in this case and none of the witnesses at trial had any involvement in any of the events relating to that tax conviction.

ARGUMENT

A. Introduction.

The Petition for Writ of Certiorari should be denied because the case raises no compelling reasons to justify United States Supreme Court review. First, there is no conflict among the United States Courts of Appeals or the state courts of last resort with respect to any question properly before this Court. Second, the Third Circuit did not depart in any way from the accepted and usual course of judicial proceedings, but instead, merely recognized that the District Court had properly applied established rules of law. Third, the Third Circuit did not, nor did it have occasion to,

decide an important question of federal law which has not yet been decided by this Court. In short, both the District Court's rulings and the Third Circuit's Order affirming same are consistent with this Court's decisions and the decisions rendered in other courts such that there are no special or important reasons for granting certiorari in this case.

B. Petitioners' Misstatements of Law and Fact.

Plaintiffs' Petition contains numerous distortions of the record and outright misrepresentations of facts, which Plaintiffs use to spin their own theory of the case with the hope that this Court will grant their request for review. Given the page limitations of this Brief, it is impossible to address all of Plaintiffs' misstatements. Georgia-Pacific has addressed a number of Plaintiffs' misrepresentations in the body of this Brief, where necessary, to demonstrate the lack of merit of their legal arguments. Additional misstatements are addressed below:

1. Throughout their Petition, Plaintiffs misrepresent Georgia-Pacific's complaint review procedure and how that policy applied to them. Georgia-Pacific's procedure provided that an employee's internal complaint would be investigated at the local plant level unless the employee had retained an attorney or filed a formal charge of discrimination with the federal Equal Employment Opportunity Commission ("EEOC") or a state agency, in which case the investigation would be handled by Georgia-Pacific's corporate human resources and/or legal departments. The results of Georgia-Pacific's investigation would then be submitted in an official response to the investigatory agency or the complainant's attorney. An employee who filed a formal charge of discrimination or retained legal counsel could still utilize the complaint review procedure for matters unrelated to the pending charge; however, local plant officials

were instructed not to discuss pending charges with the complaining employee or her attorney.

Plaintiffs' complaints were handled in strict compliance with Georgia-Pacific's procedure. At the time they wrote their October 25, 1991 letter to Donald Glass, Plaintiffs had already filed charges of discrimination with the EEOC. Therefore, the investigation of Plaintiffs' complaints was handled by Jim Hurd, Georgia-Pacific's Gypsum Division labor relations manager, and Georgia-Pacific's attorneys. Although local plant personnel were instructed not to communicate with Plaintiffs or their attorney about their pending EEOC charges, as those matters were being handled at the corporate level, Georgia-Pacific's complaint procedure was always available to Plaintiffs to raise any other matters. Plaintiffs submitted no evidence at trial to suggest a connection between their terminations and Georgia-Pacific's application of its complaint review procedure.

2. Plaintiffs misrepresent the testimony of Montgomery Palmowski, who was employed as the Plant Manager at the Wilmington Plant until December 3, 1991. According to Plaintiffs, on October 1, 1991, Palmowski "stormed" into the security guardhouse, confronted Plaintiffs Walden and Poirier about their pending EEOC charges, and told Plaintiffs Walden and Poirier "that Atlanta was upset and that they should consider dropping or withdrawing the EEOC charges because 'the timing was absolutely poor.'"[2] At trial, Palmowski explained that his statement about the poor timing of Plaintiffs' charges was an expression of his own opinion and was based upon his frustration over his attempt to save Plaintiffs' jobs from Georgia-Pacific's division-wide cost savings initiatives. Palmowski further testified that he did not

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[2] Plaintiffs' Petition, p. 13.

threaten Plaintiffs Walden or Poirier at the time he approached them about their EEOC charges. To the contrary, Palmowski assured Plaintiffs Walden and Poirier that they had every right to file their EEOC charges.

3. Throughout their statement of facts, Plaintiffs repeatedly suggest that the terminations of the former Wilmington Plant Manager, Montgomery Palmowski, and the former Personnel and Safety Manager, Carolyn Wunsch, were somehow tied to Plaintiffs' August 1991 EEOC charges or Plaintiffs' discharges.[3] There was absolutely no evidence in the record, however, to support Plaintiffs' wild speculation in this regard. Rather, the undisputed evidence at trial was that Palmowski and Wunsch were terminated because they engaged in an improper personal relationship.

4. In addition to the broader areas of misrepresentation discussed above, Plaintiffs have cited and relied upon numerous "facts" which were either not in evidence in this case or were distorted in Plaintiffs' Petition. For instance, Plaintiffs cite an EEO Issues newsletter which they contend was the genesis of Georgia-Pacific's attitude toward employees who engaged in protected activity.[4] Plaintiffs fail to mention, however, that the 1984 EEO Issues newsletter to which they cite was not admitted in evidence in the case. Similarly, Plaintiffs repeatedly demean the performance of OSS Security, the outside contractor hired to replace Plaintiffs at the Wilmington Plant.[5] However, the trial court did not permit any evidence about the performance of the replacement guards in the record because such evidence

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[3] Plaintiffs' Petition, pp. 9, 14.

[4] Plaintiffs' Petition, pp. 8-9.

[5] Plaintiffs' Petition, pp. 11, 12.

was irrelevant to Plaintiffs' claims of retaliatory discharge. Finally, Plaintiffs state that prior to the time that they met with the EEOC investigator on May 7, 1991, Carolyn Wunsch met with them and "wanted the plaintiffs to mislead the EEOC investigator and to give statements favorable to the company."[6] Plaintiffs' contention in this regard is, at best, an overstatement and, at worst, an outright misrepresentation of the record. In fact, at trial none of the Plaintiffs testified that Wunsch instructed them to lie or mislead the EEOC investigator in any respect; rather, each of the Plaintiffs testified that Wunsch discussed Georgia-Pacific's position with them and instructed them to speak the truth.

C. The District Court and the Third Circuit Correctly Determined That Plaintiffs Were Not Entitled to a Mixed-Motives Jury Charge Because They Failed to Produce Legally Sufficient Direct Evidence of Retaliation.

Plaintiffs contend that the Third Circuit erred when it affirmed the District Court's decision not to give a "mixed-motives" jury charge. As demonstrated below, Plaintiffs' contention is meritless. The District Court and the Third Circuit correctly determined that Plaintiffs were not entitled to a mixed-motives jury charge because Plaintiffs failed to present sufficient "direct evidence" of retaliation under the standard established by this Court in *Price Waterhouse*.

1. The Legal Standards Regarding "Direct Evidence" of Retaliation and "Mixed-Motives" Jury Charges.

The federal courts have recognized that employment discrimination cases can be advanced on either a "pretext"

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[6] Plaintiffs' Petition, pp. 10-11.

theory or a "mixed-motives" theory. The distinction between these two types of cases is critical because each employs a different burden of proof and a different jury instruction regarding the appropriate standard of causation. "Pretext" cases utilize the burden-shifting framework first established in *McDonnell Douglas* and later refined in *Burdine* where only the burden of production shifts to the defendant and the burden of persuasion remains with the plaintiff at all times.[7] In "mixed-motives" cases, the plaintiff's evidence is so revealing of retaliatory animus that the burden of production and persuasion shifts to the defendant to show that, even if retaliation was a motivating factor in the adverse employment decision, the defendant would have made the same decision in the absence of the retaliatory animus.[8]

Whether a case is a mixed-motives case or a pretext case depends on the nature of the evidence introduced at trial by the plaintiff. In order to establish a mixed-motives case and to receive a mixed-motives jury charge, a plaintiff must present sufficient "direct evidence" of the employer's discriminatory animus. Not all evidence that is probative of illegal motives, however, constitutes direct evidence sufficient to shift the burden of proof to the defendant. Rather, the direct evidence requirement is a high standard of proof that requires a plaintiff to present evidence of discriminatory statements or conduct by decisionmakers who were directly involved in the adverse employment decision. As Justice O'Connor explained in her concurrence in *Price Waterhouse*:

> stray remarks in the workplace . . . cannot justify requiring the employer to prove that

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[7] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[8] *See Price Waterhouse*, 490 U.S. 228; 42 U.S.C. § 2000e-2(m).

> its decisions were based on legitimate criteria. Nor can statements by nondecisionmakers or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden of proof in this regard; . . . . What is required is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.[9]

Consistent with this Court's teachings in *Price Waterhouse*, the Third Circuit Court of Appeals has defined direct evidence as evidence that "directly reflect[s] a discriminatory or retaliatory animus on the part of a person involved in the decision making process."[10] The question of whether a plaintiff has met its burden of introducing direct evidence of retaliation is a matter of law to be decided by the trial court after the close of evidence and prior to instructing the jury.[11]

2. Plaintiffs Were Not Entitled to a Mixed-Motives Jury Charge Because They Failed to Introduce Legally Sufficient Direct Evidence of Retaliation at Trial.

In their Petition for Writ of Certiorari, Plaintiffs contend that they were entitled to a mixed-motives charge because they introduced "direct evidence" of retaliation by Georgia-Pacific. Plaintiffs' direct evidence argument focuses

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[9] *Price Waterhouse*, 490 U.S. at 277 (internal citations omitted).

[10] *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994); *accord Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Hook v. Ernst & Young*, 28 F.3d 366, 373-75 (3d Cir. 1994).

[11] *Armbruster*, 32 F.3d at 782 n.17.

on two pieces of evidence: (1) Georgia-Pacific's internal complaint handling procedures; and (2) certain statements made by former Plant Manager Montgomery Palmowski.[12] As shown below, Plaintiffs have grossly mischaracterized both the facts and the applicable case law in an attempt to manufacture error by the courts below. Neither the evidence relating to Georgia-Pacific's complaint handling procedures nor the statements by Palmowski, either separately or in conjunction, constitutes sufficient direct evidence of retaliation to require a mixed-motives jury charge.

a. Georgia-Pacific's Internal Complaint Handling Procedure Does Not Constitute "Retaliation Per Se."

The evidence at trial showed that Georgia-Pacific had a policy whereby employees were encouraged to bring complaints to management and to attempt to resolve those complaints at the local level, if possible. However, the policy also provided that once an employee filed an EEOC charge or hired an attorney, Georgia-Pacific's investigation of their complaints would not be handled at the local level, but instead, would be handled by the corporate human relations and legal staffs. The results of the Company's investigation would then be submitted in an official response to the EEOC. In their Petition, Plaintiffs contend that they were entitled to a mixed-motives jury charge because this policy constitutes "retaliation per se." Plaintiffs' contention is without merit because it is based upon a grossly distorted presentation of the applicable case law and the facts of record.

As an initial matter, the legality of Georgia-Pacific's complaint handling procedure is not properly before this Court. The only issue in this case--and the only issue

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[12] Plaintiffs' Petition, p. 17.

presented to the jury--was whether Plaintiffs were discharged in retaliation for engaging in activities protected by Title VII. Plaintiffs tried to add a separate cause of action based on Georgia-Pacific's complaint handling procedures just prior to closing arguments, but the District Court rejected Plaintiffs' eleventh-hour attempt to interject a new cause of action because Plaintiffs had not raised any such claim in either their Complaint or their Pre-Trial Order.[13] Plaintiffs did not challenge this decision by the District Court and, as a result, the Third Circuit never reached the merits of Plaintiffs' "retaliation per se" argument.

Notwithstanding Plaintiffs' misrepresentations about the nature of their claims at trial, Georgia-Pacific's internal complaint handling policy does not violate Title VII as a matter of law. The only United States Court of Appeals to address the legality of an internal complaint procedure like Georgia-Pacific's is the Second Circuit. In *United States v. New York City Transit Authority*, 97 F.3d 672, 674 (2d Cir. 1996), a case that is virtually identical to this case, the Second Circuit explicitly authorized employers to handle internal complaints differently depending on whether the complaining party has filed an EEOC charge. The New York Transit Authority had an Internal Discrimination Complaint Procedure whereby an employee who wished to complain about discrimination completed an intake questionnaire and was interviewed by a local EEO department investigator. After conducting an investigation, the EEO department would issue a written determination and then attempt to resolve the complaint through conciliation.[14] However, if the

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[13] *Walden v. Georgia-Pacific Corporation*, 126 F.3d 506, 512 n.4. (3d Cir. 1997).

[14] The Transit Authority's Internal Discrimination Complaint Procedure is actually more formalized than Georgia-Pacific's complaint

[Footnote Continued On Next Page]

complaining employee had filed an EEOC charge or if the complaint was the subject of other external proceedings, then the complaint would be transferred to the Transit Authority's law department and would not be processed through the EEO department's internal investigation/conciliation process.[15] Like Plaintiffs in this case, the EEOC in *Transit Authority* contended that the Transit Authority's policy denied plaintiffs the full exercise of their rights under Title VII because persons who filed EEOC charges could not also pursue their complaint with the Transit Authority's EEO division.

The Second Circuit concluded, as a matter of law, that the Transit Authority's complaint procedure cannot constitute retaliation under Title VII because the Transit Authority was simply taking reasonable defensive measures to defend itself against the employees' charges.[16] The Second Circuit's analysis is deserving of extensive quotation:

> At some level of generality, any action taken by an employer for the purpose of defending against the employee's charge can be characterized as adverse to the employee. Ordinary defensive measures are taken for the very purpose of defeating the employee's claim. . . . But it cannot be

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[Footnote Continued From Previous Page]

procedures. Georgia-Pacific encouraged its employees to bring their complaints to management's attention for investigation, but unlike the Transit Authority, Georgia-Pacific did not render any written determinations following the investigation nor did it commit to any specific resolution procedures.

[15] *Transit Authority*, 97 F.3d at 675.

[16] *Id.* at 679.

> doubted that an employer may retain legal counsel to deal with discrimination claims and take other steps reasonably designed to prepare for and assist in the defense. An employer has latitude in deciding how to handle and respond to discrimination claims, notwithstanding the fact that different strategies and approaches in different cases and different classes of cases will result in differences in treatment. Reasonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment.[17]

Later in its opinion, the Second Circuit observed that "it seems obvious that the commencement of litigation or administrative proceedings would galvanize the employer to seek legal counsel or otherwise shift tactics. This phenomenon does not support an inference of retaliation. Legitimate and ordinary defensive interests furnish all the cause and effect needed to account for it."[18] Finally, the Second Circuit recognized an employer's legitimate interest in avoiding duplicative investigations by various departments because "considerations of efficiency and prudence have nothing to do with retaliatory animus or discrimination."[19]

Inexplicably, Plaintiffs make no mention of the Second Circuit's *Transit Authority* decision in their Petition.

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[17] *Id.* at 677.

[18] *Id.* at 678.

[19] *Id.*

This glaring omission by Plaintiffs is troubling for two reasons. First, *Transit Authority* expressly overruled one of the cases that Plaintiffs cite in their Petition, *United States v. New York City Transit Authority*, 885 F. Supp. 442 (E.D.N.Y. 1995). Plaintiffs were clearly aware of this overruling prior to filing their Petition because Georgia-Pacific quoted the Second Circuit's decision in its brief to the Third Circuit. In fact, Plaintiffs' counsel was asked about the overruling by the Third Circuit panel during oral argument. Second, Plaintiffs' decision not to inform this Court about the *Transit Authority* opinion is disturbing because Plaintiffs represented to this Court that:

> cases decided in circuits other than the Third Circuit are in unanimous agreement that the closing of an open door policy in any manner because employees have filed charges with an outside agency which [sic] is actionable as retaliation per se. The United States Court of Appeals for the Third Circuit is the only circuit that has faced this issue and failed to recognize the closure of an open door policy as a cause of action.[20]

In light of *Transit Authority*, Plaintiffs' characterization of the state of the law is misleading at best.

Moreover, while failing to acknowledge the only applicable case law, Plaintiffs cite as controlling a series of a plainly distinguishable cases. In addition to the overruled district court decision in *Transit Authority*, Plaintiffs rely upon four cases to support their contention that Georgia-

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[20] Plaintiff's Petition, p. 18.

Pacific's policy constitutes retaliation per se: (1) *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir. 1992); (2) *Johnson v. Palma*, 931 F.2d 203 (2d Cir. 1991); (3) *Owens v. New York City Housing Authority*, 1994 LEXIS 3348, 1994 WL 97411 *3 (S.D.N.Y.); and (4) *EEOC v. General Motors Corp.*, 826 F. Supp. 1122 (E.D. Ill. 1993). The decisions in *Johnson* and *Board of Governors* are plainly inapposite because those decisions involved employees' contractual rights under a collective bargaining agreement to proceed against their employers in binding arbitration. As the Second Circuit observed in *Transit Authority*, the employer's actions in *Johnson* and *Board of Governors*

> cost employees the right, contractually guaranteed in a collective bargaining agreement, to proceed against their employers in a binding arbitration that would control the outcome of an ultimate employment decision (firing and denial of tenure). Neither case bears upon the Transit Authority's voluntary, internal arrangements for investigating and mediating discrimination controversies.[21]

Although the district court's decision in *General Motors* arguably supports Plaintiff's position, the reasoning in that case was expressly rejected by the Second Circuit in *Transit Authority*.[22] In addition, no United States Court of Appeals has adopted the reasoning and analysis set forth in *General Motors*. Finally, the *Owens* decision is unavailing to Plaintiffs

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[21] *Transit Authority*, 97 F.3d at 679.

[22] *Id.* at 678-79 & n.5.

because, to the extent it even supports Plaintiffs' argument, that decision was implicitly overruled by the Second Circuit's opinion in *Transit Authority*.[23]

In short, the Second Circuit is the only United States Court of Appeals that has evaluated the legality of an informal internal complaint handling policy like that employed by Georgia-Pacific and that court determined that such a policy is a reasonable defensive measure that does not violate Title VII's anti-retaliation provisions.

b. The Application of Georgia-Pacific's Complaint Procedures to Plaintiffs in this Case Does Not Constitute Direct Evidence of a Retaliatory Discharge.

Not only is Georgia-Pacific's internal complaint handling procedure permissible under Title VII, there is nothing about the manner in which Georgia-Pacific applied its policy toward Plaintiffs that could possibly constitute "direct evidence" that Plaintiffs were discharged in retaliation for engaging in protected activities under Title VII. At trial, Plaintiffs introduced an October 1991 letter that they sent to Donald Glass, one of Georgia-Pacific's Senior Vice-Presidents, in which Plaintiffs complained about the Company's replacement of one of the Wilmington guards with OSS Security and expressed their concern that they too would be replaced. Plaintiffs also testified that following their submission of the October 1991 letter to Glass, local Wilmington management refused to discuss their pending EEOC charges and the Gypsum Division's labor relations manager, James Hurd, refused to investigate the complaints raised in their letter to Glass.

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[23] *Id.*

Despite Plaintiffs' argument to the contrary, this evidence relating to Georgia-Pacific's handling of Plaintiffs' October 1991 letter does not constitute direct evidence that Plaintiffs were terminated in February 1992 in retaliation for engaging in protected activities. As Plaintiffs argued at trial and in their Petition, the person who allegedly "shut down the open door policy" was James Hurd.[24] What Plaintiffs fail to grasp is that any actions by Hurd, even if probative of retaliation, cannot constitute direct evidence of retaliatory discharge because he had absolutely no involvement in the decision to replace Plaintiffs with an outside security service. As the Third Circuit correctly stated:

> the evidence presented by the plaintiffs that the company, and in particular Labor Relations Manager Hurd, shut down the open door policy also is not sufficient to require a mixed-motives charge. As the human resources director for the entire division, Hurd himself was not in the direct chain of command over the plaintiffs, and there is no evidence that he was involved in the decision to replace the plaintiffs with the outside guard service in any way. Moreover, this evidence, even if probative of retaliatory motive, is circumstantial evidence that does not rise to the level of evidence that "directly" reflects retaliatory animus.[25]

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[24] Plaintiffs' Petition, p. 17.

[25] *Walden*, 126 F.3d at 515.

In short, both the District Court and the Third Circuit correctly concluded that the evidence presented at trial relating to Georgia-Pacific's handling of Plaintiffs' October 1991 letter to Donald Glass was, at most, circumstantial evidence of retaliation that did not warrant a mixed-motives jury charge.

c. The Testimony of Former Georgia-Pacific Employee Montgomery Palmowski Did Not Warrant A Mixed-Motives Jury Charge.

Plaintiffs also contend that they were entitled to a mixed-motives jury charge based on the trial testimony of Montgomery Palmowski. This contention is meritless because Plaintiffs have grossly mischaracterized Palmowski's actual trial testimony. Palmowski testified at trial that he told Plaintiffs that, in his opinion, the timing of their EEOC charges was "absolutely poor" and that the Company was "upset" about their charges.[26] Palmowski certainly never testified, as Plaintiffs suggest, that Georgia-Pacific told him to "have the Plaintiffs withdraw their EEOC charges or to fire the plaintiffs" nor did Palmowski testify that "the punishment for being disloyal to the defendant by filing EEOC charges was termination of their employment."[27]

The Third Circuit carefully reviewed and properly rejected Plaintiffs' argument that Palmowski's testimony constituted sufficient direct evidence to justify a mixed motives jury charge. The Third Circuit analyzed the effect of Palmowski's testimony as follows:

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[26] *Walden*, 126 F.3d at 514.

[27] Plaintiffs' Petition, p. 21.

> [A]s to Palmowski's warning to the plaintiffs that the company was upset about the EEOC charge, Palmowski was discharged several months before the plaintiffs were themselves fired and therefore could not have been involved in Schutte's termination decision . . . . Moreover, there is no evidence suggesting that Palmowski ever recommended that the plaintiffs be replaced. In fact, there is significant evidence that Palmowski worked to save the plaintiffs' jobs. The plaintiffs respond that Palmowski's statements reflected the retaliatory animus of the Georgia-Pacific managers who actually participated in the decision to fire them. But Palmowski's statement is vague and unconnected to any specific participant in the decision to replace the plaintiffs. As such, it could not constitute evidence that directly reflects retaliatory animus on the part of the decisionmakers.[28]

Thus, Palmowski's trial testimony fell far short of satisfying the stringent direct evidence standard set forth in *Price Waterhouse* because (1) Palmowski was fired months before Plaintiffs were terminated; (2) Palmowski had no involvement whatsoever in Howard Schutte's decision to replace Plaintiffs with an outside security service; and (3) Palmowski's testimony does not reveal any retaliatory animus by any persons involved in that decision. Therefore, Plaintiffs were not entitled to a mixed-motives jury charge.

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[28] *Walden*, 126 F.3d at 515.

In summary, as shown above and as is evident from a review of the Third Circuit's opinion in this case, Plaintiffs were not entitled to a mixed-motives jury charge because they did not introduce any direct evidence of retaliation under the standard set forth by this Court in *Price Waterhouse*. Plaintiffs' contention that Georgia-Pacific's complaint handling policy and the Company's application of that policy in response to Plaintiffs' October 1991 letter constitutes direct evidence of retaliation is fundamentally incorrect and is based upon a grossly distorted presentation of the applicable case law. Similarly, Plaintiffs have badly mischaracterized the nature of Montgomery Palmowski's trial testimony. Regardless of such inaccuracies, Plaintiffs' legal argument demonstrates a fundamental misunderstanding of this Court's direct evidence standard, which requires statements or actions directly reflecting a retaliatory motive by persons who were actually connected with the decision-making process.

D. The Third Circuit Correctly Held That Evidence Relating to a Prior Georgia-Pacific Tax Conviction Could Not Be Used to Impeach Corporate Employees Who Were Not Involved In the Conduct Leading to the Conviction.

Plaintiffs also challenge the exclusion of evidence relating to a tax dispute that ultimately resulted in Georgia-Pacific's pleading guilty to tax evasion. At trial, Plaintiffs sought to introduce under Fed. R. Evid. 609 a letter from T. Marshall Hahn Jr., a former Chairman and CEO of Georgia-Pacific, relating to the Company's settlement of a tax dispute with the Internal Revenue Service. The tax dispute involved the valuation of a tract of land that Georgia-Pacific donated to a water management district in Florida in 1984, which ultimately resulted in the Company's agreement to plead guilty to tax evasion in 1991. Because Plaintiffs intended to use this evidence to impeach the testimony of

individual Georgia-Pacific employee witnesses, none of whom had any connection to the acts underlying the corporate conviction, the District Court excluded this evidence as unduly prejudicial under Fed. R. Evid. 403.

On appeal to the Third Circuit and in their Petition to this Court, Plaintiffs contend that the evidence relating to Georgia-Pacific's corporate tax conviction was automatically admissible as impeachment evidence under Fed. R. Evid. 609(a)(2) and that the trial court did not have any discretion to exclude such evidence under Rule 403. Plaintiffs' argument misses the point and is incorrect as a matter of law. The cases cited by Plaintiffs in their Petition, indeed every reported case involving Rule 609(a)(2), involve the issue of whether a witness could be impeached with evidence of his *own* prior criminal conviction. None of these cases address the situation where, as here, a party seeks to use a *corporation's* conviction to impeach the testimony of an *individual* witness who was not involved in the underlying corporate acts.

The issue that was before the Third Circuit and that is presently before this Court is whether Rule 609 should apply at all in a situation where, as here, a prior conviction of a corporation is to be used to impeach the testimony of individual employee witnesses without any evidence that those witnesses participated in the conduct underlying the conviction. The answer to that question is clearly "no." When evidence is admitted under Rule 609, its intended purpose is to inform the jury about character evidence of the particular witness whose testimony the jury is asked to evaluate.[29] Obviously, only the testifying witness' *own*

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[29] *Walden*, 126 F.3d at 523; *United States v. Martinez*, 555 F.2d 1273, 1275 (5th Cir. 1977).

convictions bear directly on the issue of whether the witness' testimony is truthful.[30] Thus, as the Third Circuit held in this case, the corporation's conviction "must be the individual employee's 'own' in some meaningful fashion"--i.e., the individual employee must have been involved in the events leading to that corporate conviction--in order for that evidence to be admissible under Rule 609.[31]

Applying the Third Circuit's admissibility standard to the facts of this case, the District Court properly excluded the evidence relating to Georgia-Pacific's 1991 guilty plea. None of the Georgia-Pacific employees involved in this case and none of the witnesses at trial had any involvement in either the disputed land transaction or the handling of the subsequent investigation. Furthermore, none of these individuals held a management position that would support an inference that they had any connection to the events in question. As the Third Circuit observed, "[i]t strains logic to argue that an employee's credibility is properly brought into question by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts no matter how egregious those acts may have been."[32] Therefore, the Third Circuit properly affirmed the trial court's refusal to allow Plaintiffs to confuse and prejudice the jury with evidence of an irrelevant tax conviction.

The Third Circuit's conclusion that Rule 609 does not apply in cases where a corporation's conviction is to be used to impeach the credibility of employee witnesses who were

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[30] *Walden*, 126 F.3d at 523; *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

[31] *Walden*, 126 F.3d at 523.

[32] *Id.* at 523-24.

not directly connected to the criminal act is consistent with the only two reported decisions that squarely address this issue: *CGM Contractors, Inc. v. Contractors Environmental Services, Inc.*, 383 S.E.2d 861, 862 (W. Va. 1989); *State of Oklahoma v. Allied Materials Corp.*, 312 F. Supp. 130, 133 (W.D. Okla. 1968). Although neither *CGM Contractors* nor *Allied Materials* involved the Federal Rules of Evidence,[33] the courts in both cases severely limited the use of corporate convictions to impeach individual employee witnesses to situations where: (1) the witness was employed in a managerial position at the time the crime occurred such that it may fairly be inferred that he/she shared responsibility for the criminal act; [34]or (2) the witness was directly involved in the conduct that led to the conviction.[35] It is also noteworthy that the only commentator to address this issue observed that Rule 609(a) is "an inappropriate vehicle" for admitting corporate convictions to impeach individual witnesses and suggested that the admissibility of such evidence should be left to the trial court's sound discretion.[36]

Finally, the Third Circuit's holding does not conflict with any prior decisions of this Court. While Plaintiffs argue that this Court's decision in *Green v. Bock Laundry Machine*

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[33] The decision in *Allied Materials* was rendered prior to the enactment of the Federal Rules of Evidence and the decision in *CGM Contractors* involved the West Virginia Rules of Evidence, which are identical to the federal rules in pertinent part.

[34] *CGM Contractors*, 383 S.E.2d at 862.

[35] *Allied Materials*, 312 F. Supp. at 133.

[36] *See* Steven L. Friedlander, *Using Prior Corporate Convictions to Impeach*, 78 Calif. L. Rev. 1313, 1338 (Oct. 1990) (suggesting that the Federal Rules of Evidence be amended to add the following provision: "The decision to allow a prior corporate conviction to attack the credibility of a witness rests in the sound discretion of the court.").

Co., 490 U.S. 504, 109 S.Ct. 1981 (1989), stands for the proposition that Rule 609's mandatory language does not allow exclusion of evidence under Rule 403 in civil cases, *Green* did not address the issue of whether a prior conviction of a corporation is admissible under Rule 609 generally to impeach the testimony of individual employee witnesses without any evidence that those witnesses participated in the conduct underlying the conviction. Rather the question in *Green* was whether Rule 609(a)(1) ***required*** a judge to permit a civil litigant to impeach a witness' credibility with evidence of the witness' own prior felony convictions, *i.e.*, whether the admissibility of such evidence was automatic.[37] The Court in *Green* summarized its holding as follows:

> In summary, we hold that Federal Rule of Evidence 609(a)(1) requires a judge to permit impeachment of a civil *witness* with evidence of prior felony convictions regardless of ensuant unfair prejudice to the *witness* or the party offering the testimony.[38]

If anything, this language from *Green* suggests a conclusion consistent with the Third Circuit's holding below because it refers to impeachment of a "witness," not a "party," with evidence of prior convictions.[39] Accordingly, the Court's opinion in *Green* provides no support for Plaintiffs' argument.

Plaintiffs also try to rely upon this Court's decision in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)

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[37] *Green*, 490 U.S at 505.

[38] *Id.* at 527 (emphasis added).

[39] *Id.*

for the proposition that corporate convictions are admissible to demonstrate the *bias* of the employee witnesses. Plaintiffs plainly misread the *Trenton Potteries* opinion. As the Third Circuit clearly and correctly stated below:

> [a]side from the fact that this case was decided decades before Rule 609 was enacted, we believe that *Trenton Potteries* stands squarely for the proposition that the witness must be implicated in the corporate conviction in order for the evidence of the conviction to be proper impeachment material. This is clear from the Court's language; *the corporate conviction is relevant if it is "preliminary" to demonstrating the witness' own implication in the offense*. While *Trenton Potteries* also suggests that the corporate conviction could be used to demonstrate that the witness is biased, such a bias inquiry is irrelevant to our consideration under Rule 609(a)(2). That is, the question presently at issue is whether the corporate conviction bears on the individual witness' propensity to commit perjury as a convicted felon, not whether the existence of the conviction somehow would bias the individual employee witness toward the corporation.[40]

Thus, like *Green*, *Trenton Potteries* provides no support for Plaintiffs' position and, if anything, it actually supports the District Court's exclusion of the 1991 tax conviction.

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[40] *Walden*, 126 F.3d at 523 *n*.15.

CONCLUSION

The Petition for Writ of Certiorari should be dismissed because Plaintiffs have not identified any compelling issues requiring review by this Court. The District Court's decision not to give a "mixed-motives" jury charge does not warrant review by this Court because (1) it does not involve any novel question of law not yet decided by this Court; (2) the courts below followed this Court's prior rulings; and (3) there is no conflict among the United States Court of Appeals on this issue. Similarly, the rulings below on the admissibility of Georgia-Pacific's corporate tax conviction do not warrant review because there is no conflict among the United States Court of Appeals and the courts below did not deviate from the usual course of judicial proceedings or any prior Supreme Court precedent. Accordingly, Plaintiffs' Petition for Writ of Certiorari should be denied.

Respectfully submitted this 20th day of March, 1998.

MICHAEL D. KAUFMAN, ESQ.
Counsel of Record
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
Counsel for Respondent